

89-660

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Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOLO,  
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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

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JULIUS ENGEL,

Petitioner,

vs.

CITY OF STOCKTON, CALIFORNIA,  
RALPH WOMACK, RALPH TRIBBLE,  
LAW ENFORCEMENT PSYCHOLOGICAL  
SERVICES, INC., MICHAEL ROBERTS,  
RICHARD WIHERA,

Respondents.

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

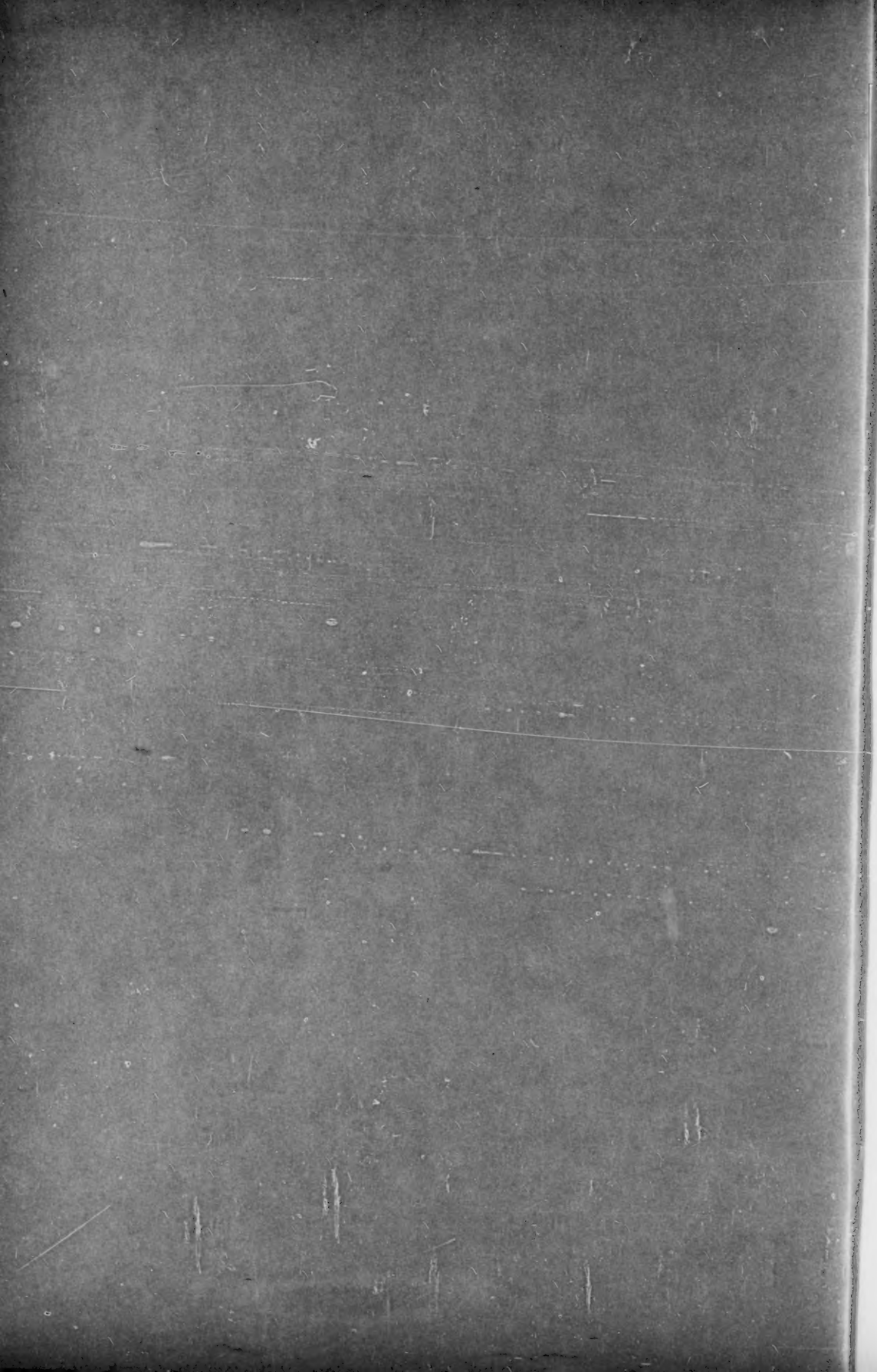
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RESPONDENTS' BRIEF IN OPPOSITION  
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24/10/89



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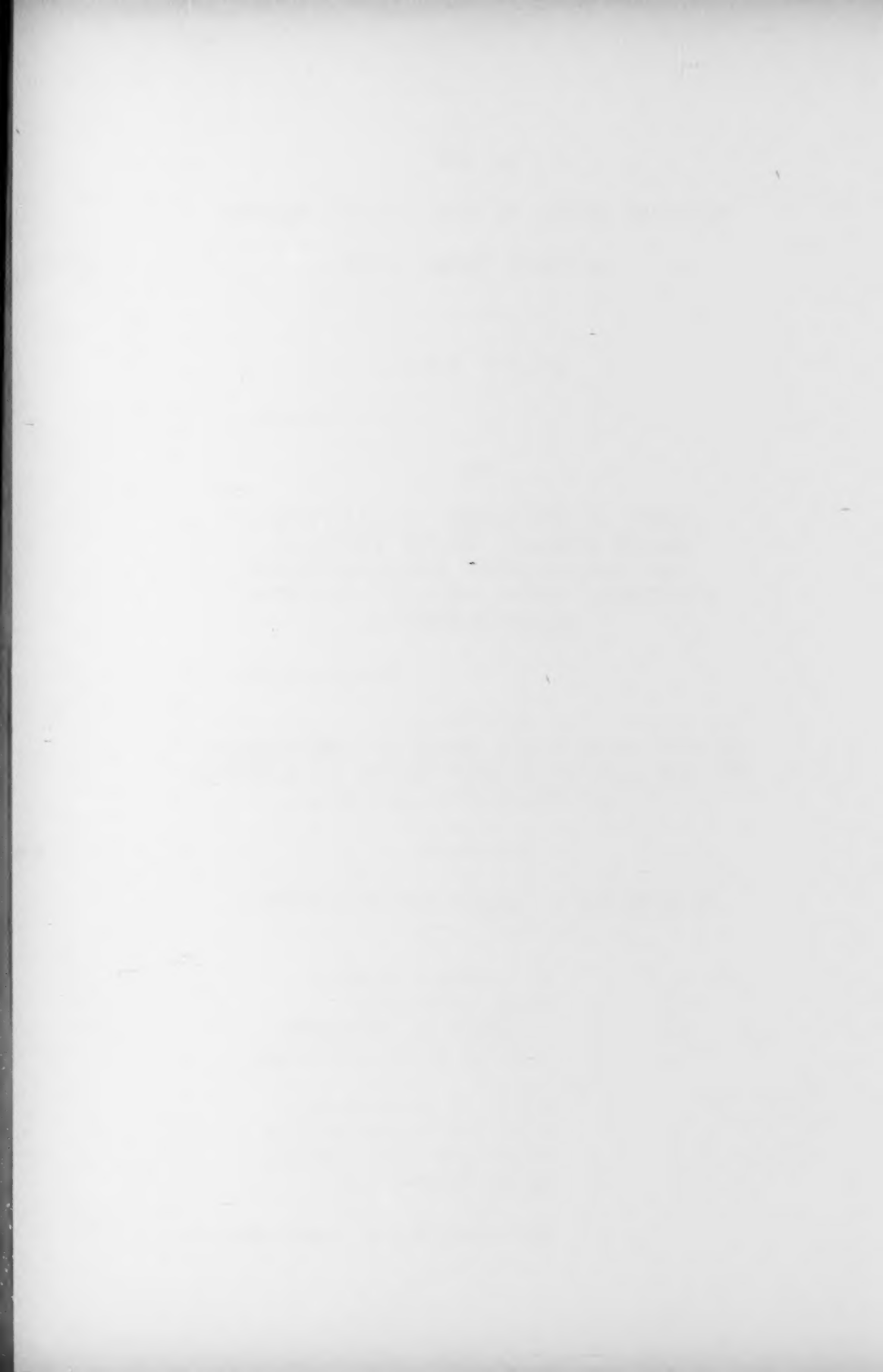
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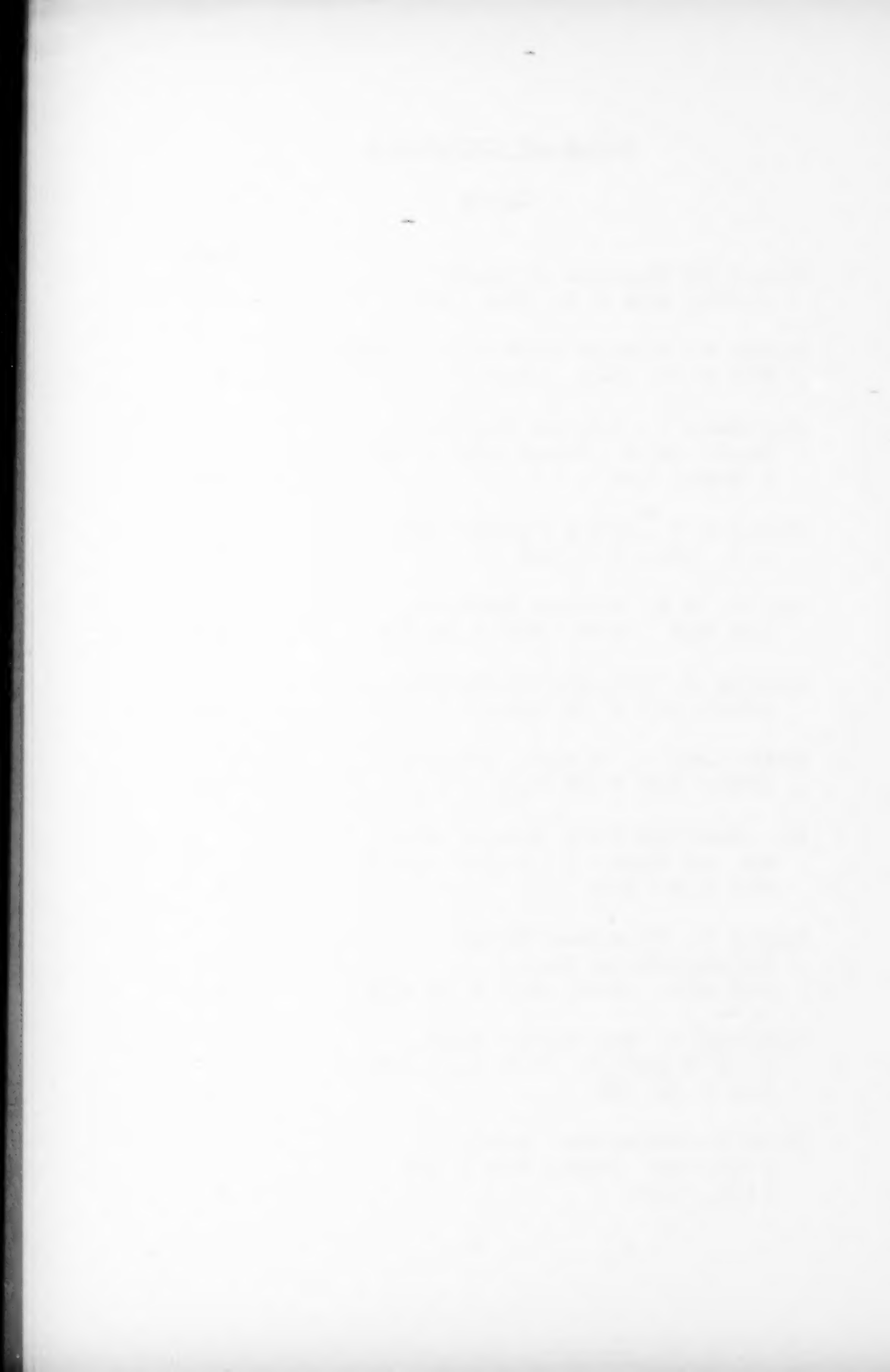
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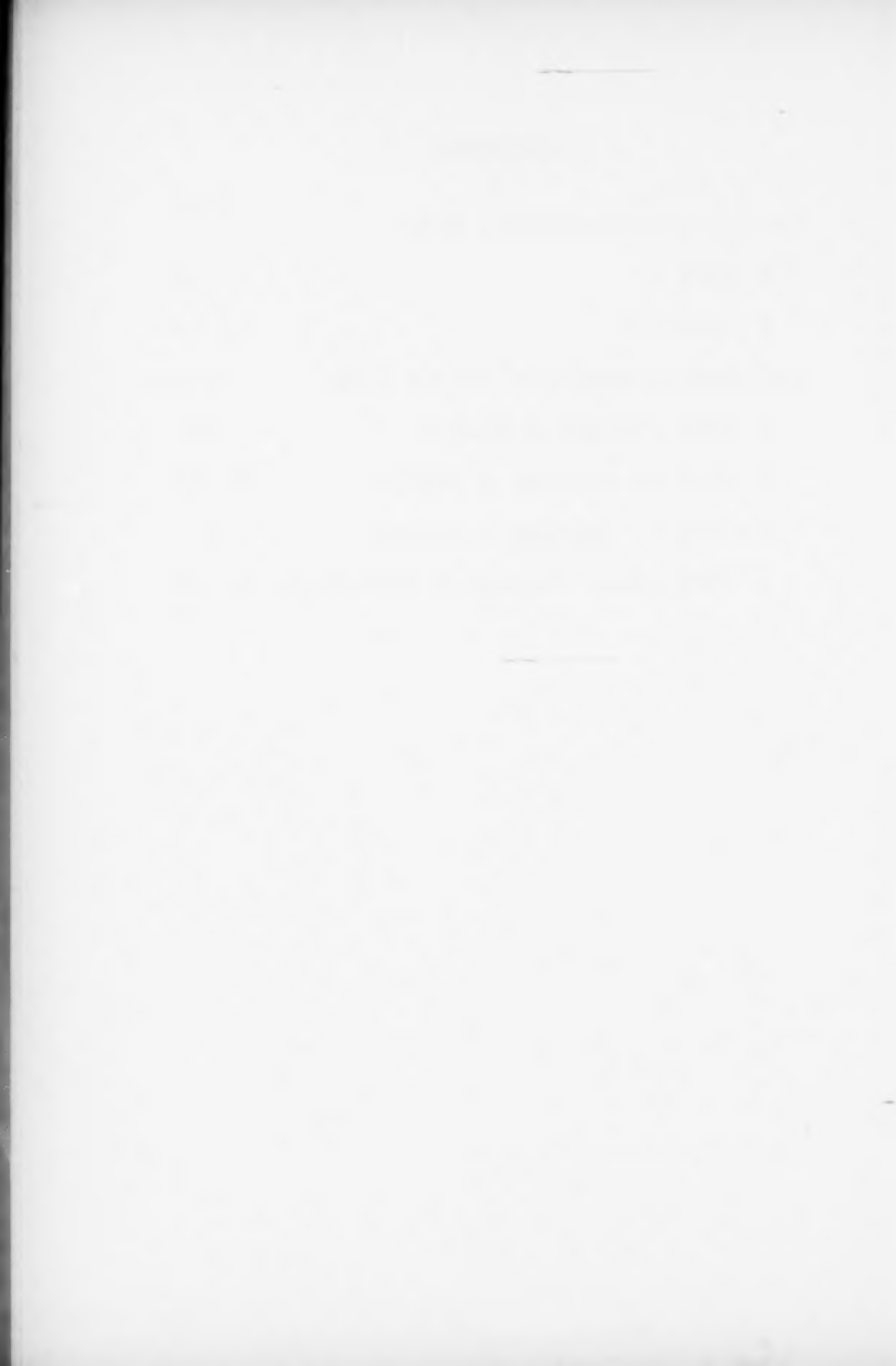
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RESPONDENTS' BRIEF IN OPPOSITION

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Respondents City of Stockton, Ralph  
Womack and Ralph Tribble respectfully  
request that this court deny the Petition  
for Writ of Certiorari seeking review of  
the Ninth Circuit's opinion in this case.  
That opinion is unreported.



## I

### QUESTIONS PRESENTED

1. Has Petitioner stated a valid claim against the City of Stockton under the First Amendment for denial of free speech and denial of the right to petition?

2. Did Petitioner make any showing of a "liberty interest" claim sufficient to overcome a Summary Judgment Motion?

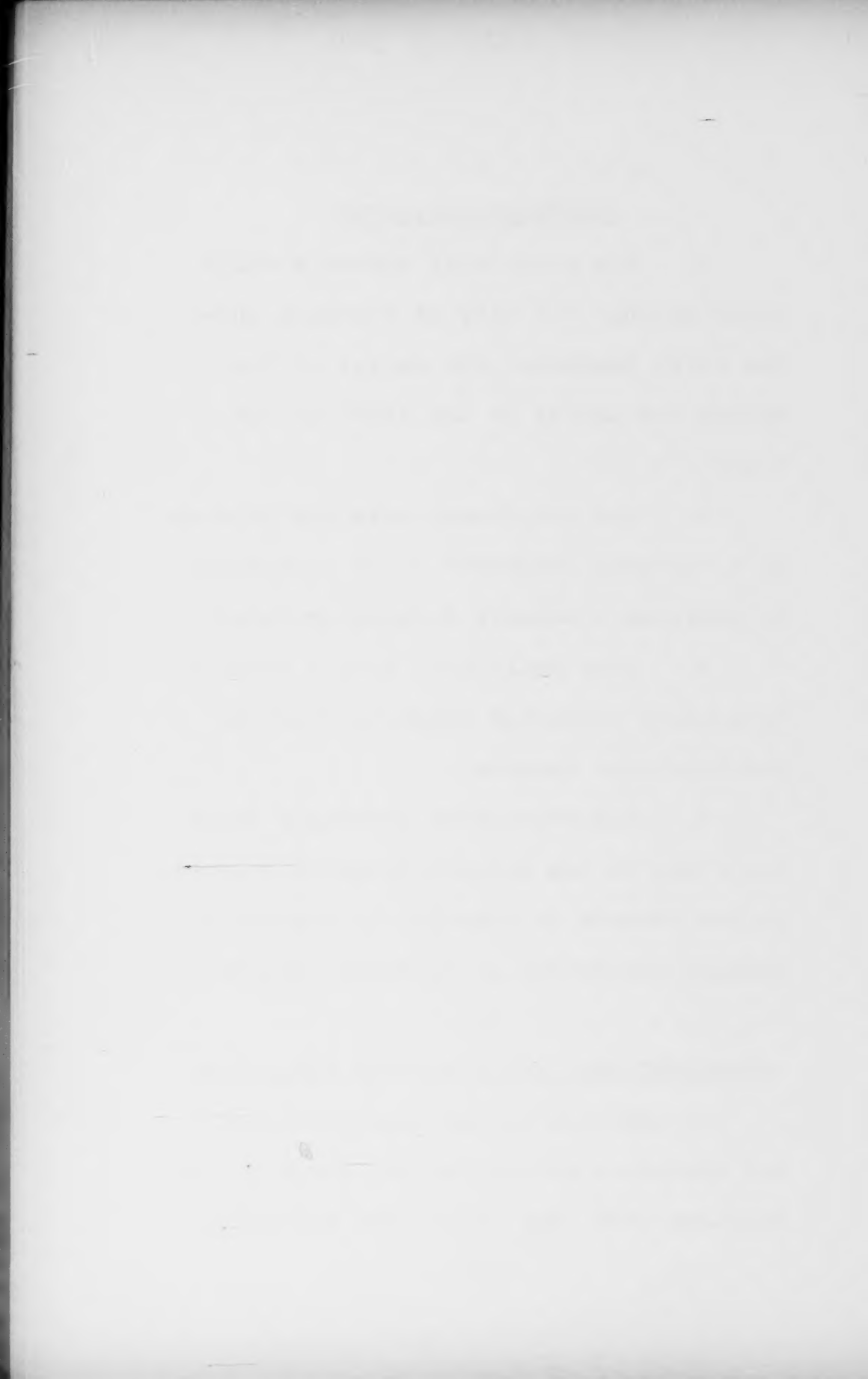
3. Does Petitioner have a constitutionally protected property right in psychological records?

4. Did Petitioner knowingly waive his right to any alleged property interest in the records in question by signing a release and waiver as to those records?

## II

### CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the constitutional and statutory provisions set forth in the Petition (Pet. App. 2-6), the following



statutory provisions are involved in this case, and are reproduced in pertinent part in the Appendix attached hereto:

California Government Code:

§ 1031

§ 12940(d)

California Health & Safety Code:

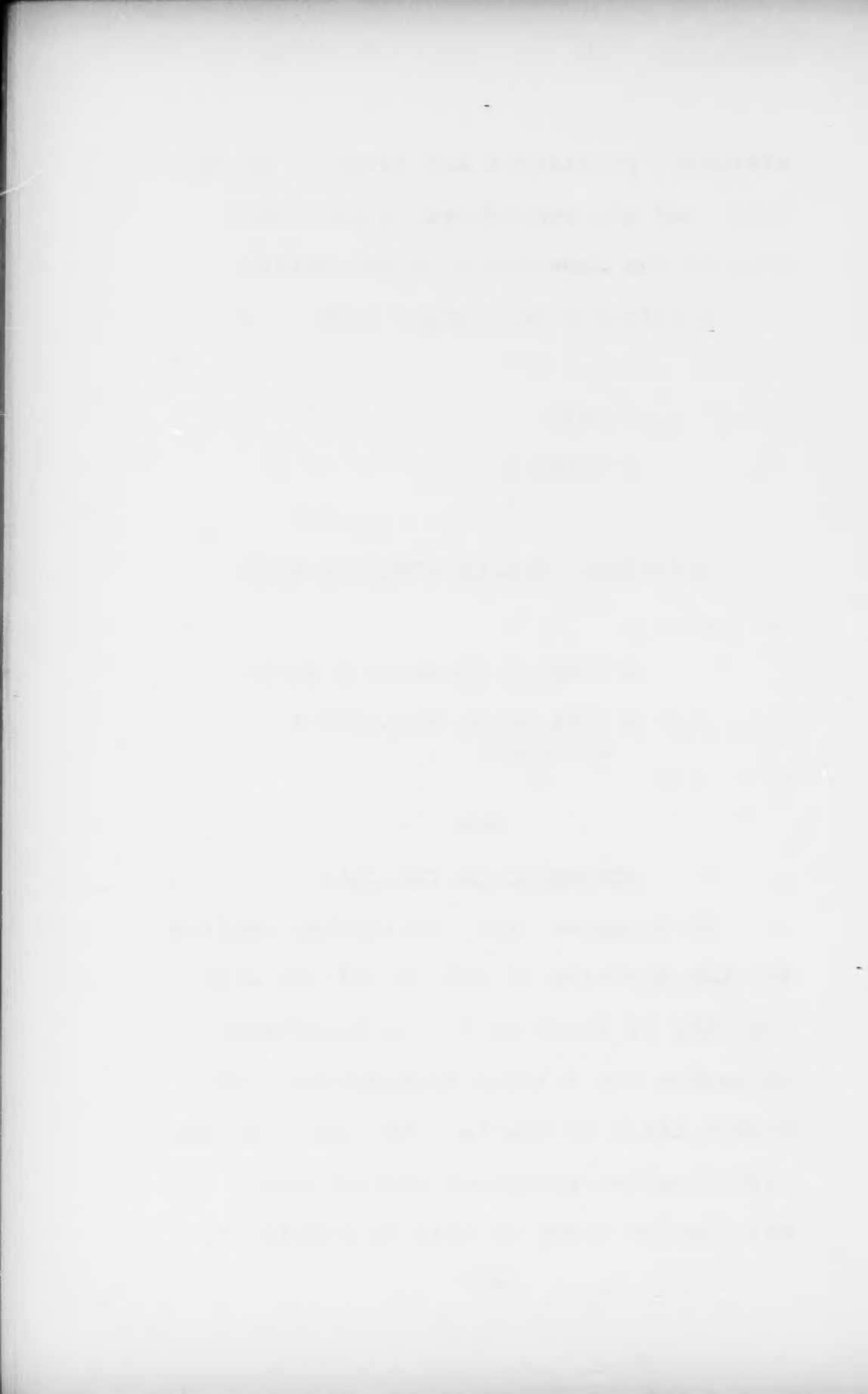
§ 1795.10 formerly § 25251

§ 1795.12(a) formerly §  
25252(a)

### III

#### STATEMENT OF THE CASE

In December 1985, Petitioner applied for the position of police officer with the City of Stockton Police Department. He passed the written examination. He signed three documents with regard to the psychological/polygraph evaluations waiving the right to read or review any





background investigation report prepared by the Stockton Police Department.

Petitioner was interviewed by Respondent Dr. Wihera, a clinical psychologist with Law Enforcement Psychological Services, Inc. (LEPS), an independent contractor hired by the City of Stockton (City) to provide psychological evaluations for prospective police officers. Dr. Wihera recommended against hiring Engel based upon the psychological evaluation. His letter to City stated "... significant performance problems are expected which are not likely to improve during the probationary period. Therefore, I recommend against hiring this applicant based on the data available."

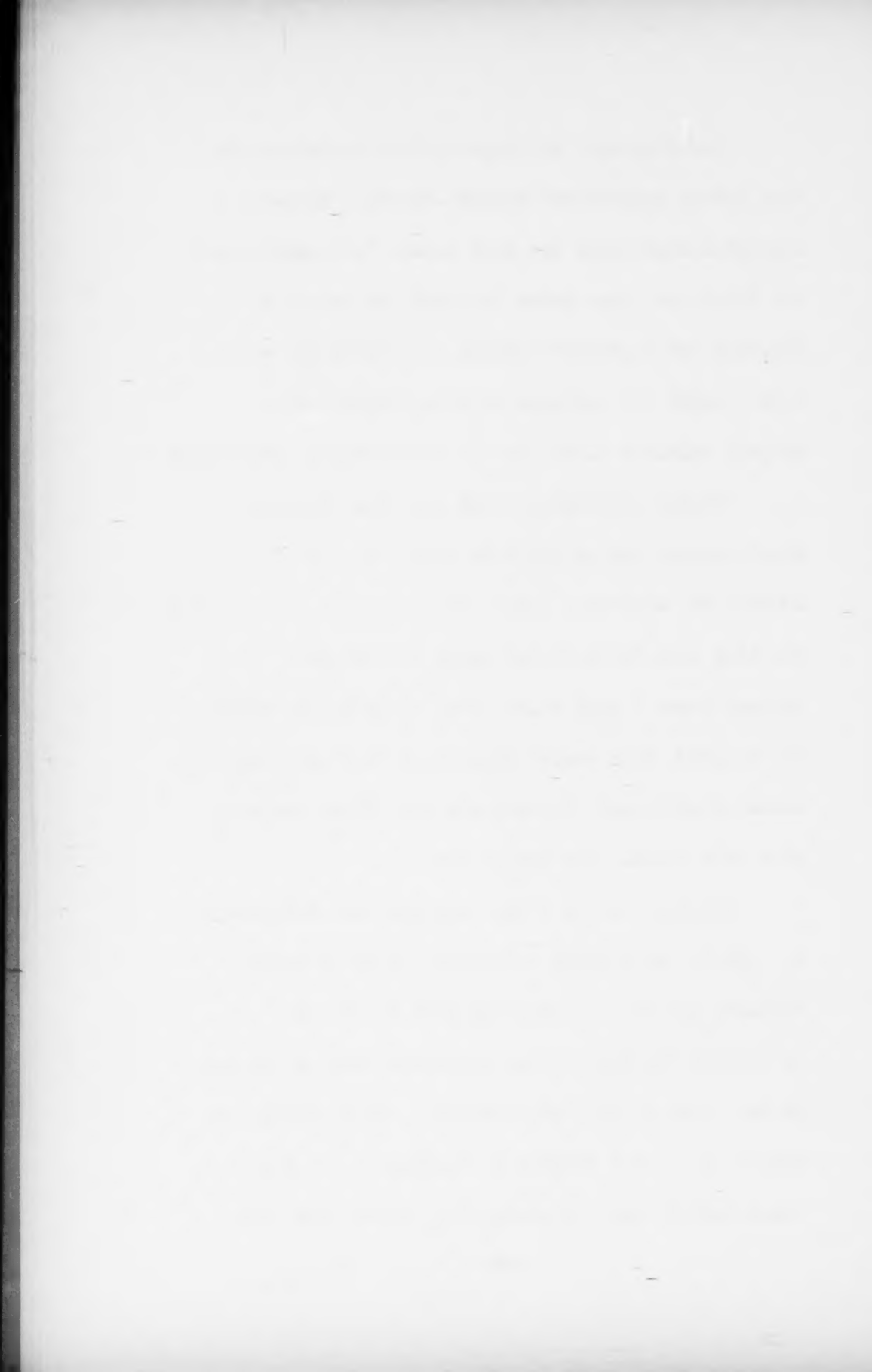
Petitioner alleges a constitutionally protected property interest in the psychological "records" of Dr. Wihera under Section 25252 (new § 1795.12) of the Health and Safety Code.

The first of the three main parts of the book is devoted to a general survey of the history of the subject. This part is divided into three chapters, each of which deals with a different aspect of the history. The second part of the book is devoted to a detailed study of the various theories which have been advanced to explain the origin of the subject. This part is divided into two chapters, each of which deals with a different aspect of the theories. The third part of the book is devoted to a study of the various methods which have been used to investigate the subject. This part is divided into two chapters, each of which deals with a different aspect of the methods. The book is written in a clear and concise style, and is well illustrated with diagrams and figures. It is a valuable work for anyone interested in the history of the subject.

Petitioner alleges that because he has been rejected based on Dr. Wihera's recommendations he has been "stigmatized" in that he has been forced to wear a "badge of infamy" which interferes with his right to pursue his occupation. Engel admits that he is gainfully employed.

Engel alleges that he was denied employment as a police officer by City based on answers that he gave to questions in the psychological and polygraph interviews, and that the responses used to reject him were based on his protected constitutional interests in free speech and the right to petition.

Engel filed this action on February 3, 1987, alleging against City a deprivation of his property and liberty interest without due process and a claim under the First Amendment. The district court granted Summary Judgment to City (and LEPS) on January 20, 1988, on the



first cause of action and dismissed the pendent state law claim without prejudice.

The decision was affirmed by the Ninth Circuit Court of Appeals on June 1, 1989. On July 21, 1989, a petition for rehearing was denied and the suggestion for a rehearing en banc was rejected.

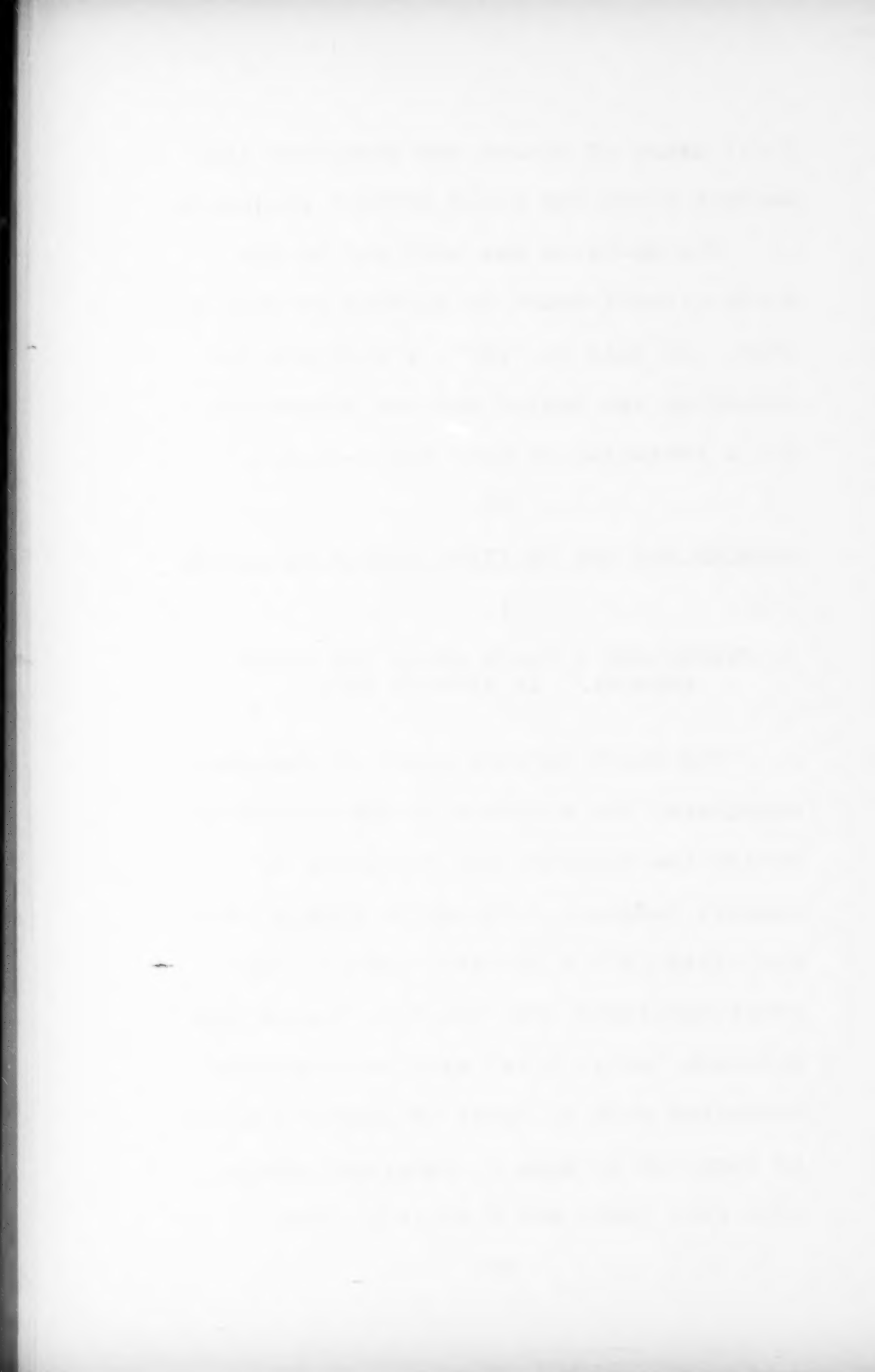
#### IV

#### REASONS WHY THE PETITION SHOULD BE DENIED

##### 1.

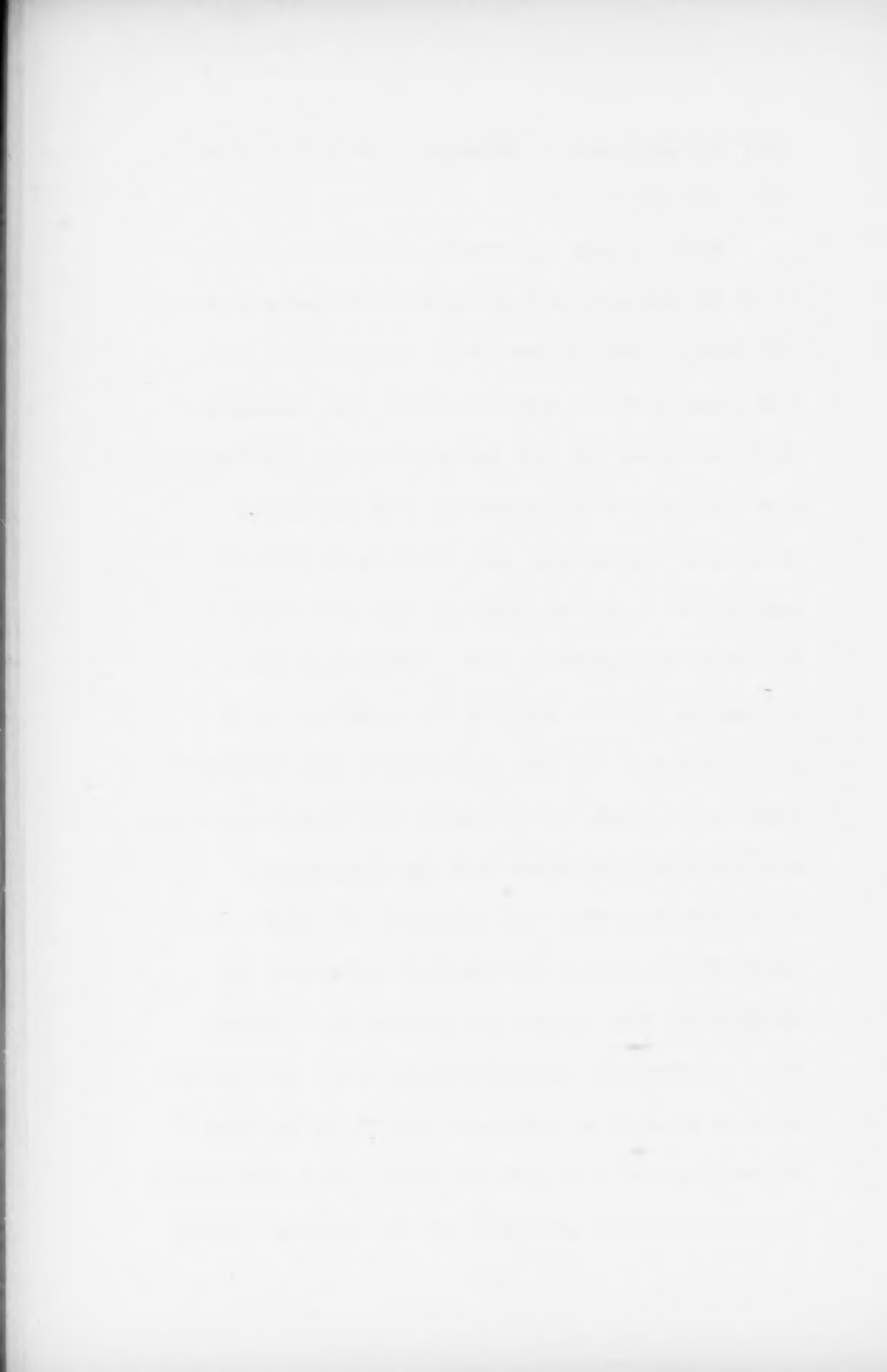
#### PETITIONER'S CLAIM UNDER THE FIRST AMENDMENT IS WITHOUT MERIT.

The Ninth Circuit Court of Appeals considered the evidence in the record to review the district court's grant of summary judgment. (Brady v. Gibbie (9th Cir. 1988) 859 F.2d 1543, 1551.) The court concluded that the free speech and petition "activities" were not remotely connected with an issue of public concern as required by Roth v. Veterans' Admin. (9th Cir. 1988) 856 F.2d 1401, 1405



(citing Connick v. Myers (1983) 461 U.S. 138, 147-48).

Petitioner contends that his right to free speech and to petition have been violated. He bases this contention on the speculative notion that the answers that he gave to the psychologist concerning his filing of grievances and lawsuits were the basis for Dr. Wihera's recommendation against hiring him and City's failure to appoint him. There is no evidence in the record to support this contention. To the contrary, the evidence indicates that the reason for his rejection was related to expected performance problems and was not related to any constitutionally protected interest in speech or the right to petition. "Even if a plaintiff demonstrates that protected speech played a substantial role in the rejection of his application, the defendant is entitled to prevail if he demonstrates





by a preponderance of the evidence that the applicant would have been rejected even in the absence of protected speech." Mt. Healthy City School Dist. Bd. of Educ. v. Doyle (1977) 429 U.S. 274.

Petitioner has provided no evidence whatever to show that his answers to questions concerning his various activities, grievances and lawsuits (personal concerns rather than public concerns) in any way impacted the decision of Dr. Wihera to recommend to the City of Stockton that Petitioner's name should be removed from the eligibility list. Engel's allegations do not support a First Amendment claim against the City.

2.

THE DECISION BELOW AFFIRMING SUMMARY JUDGMENT DENYING PETITIONER'S LIBERTY INTEREST CLAIM IS CLEARLY CORRECT.

"To constitute deprivation of a liberty interest, the stigmatizing



information must be both false ... and made public ... by the offending government entity." Quinn v. Syracuse Model Neighborhood Corp. (2d Cir. 1980) 613 F.2d 438. There is no evidence in the record to show that the conclusion reached by Dr. Wihera is false. Nor is there any evidence to show that City has made any sort of stigmatizing statement about Mr. Engel to anyone.

Petitioner's argument that the failure of an individual to pass the psychological evaluation as a peace officer is "stigmatizing" leads to the inevitable conclusion that any recommendation against hiring a prospective public safety officer on the basis of an evaluation by a psychologist should be considered a deprivation of a liberty interest. Such an interpretation by the court would undermine the legislatively and judicially approved processes for



background investigations of public safety officers. [See § 1031 and § 12940 of the Cal. Gov. Code.]

Additionally, the burden on public entities to defend a lawsuit brought by every unsuccessful job applicant where there is no showing of any stigmatizing statement or disclosure would be intolerable.

Hiring procedures which include psychological evaluations on prospective public safety officers reflect a governmental interest which far outweighs challenges by applicants which are based on mere speculation that an evaluation might be based on criteria alleged to be unlawful. Even if the court were to consider the issue, the present case is not appropriate since the necessary factual allegations are absent.



3.

THE DECISION BELOW CONCERNING  
THE ALLEGED PROPERTY INTEREST  
OF PETITIONER IN HIS PSYCHOLOGICAL  
RECORDS WAS FULLY CONSIDERED AND  
CORRECTLY DECIDED.

a. The basis for Petitioner's alleged property right to the psychological records was California Health and Safety Code section 25252(a) (West 1984) (repealed in 1988 and re-enacted as Cal. Health & Saf. Code § 1795 (West Supp. 1989)). The analysis by the Court of Appeal properly concluded that Petitioner was not entitled to written records under Section 25252(a) since (1) Dr. Wihera was not a "health care provider" under Section 25251; (2) LEPS is not a "health facility," "clinic," or "home health care agency" under subsections (a) (1)-(3); and (3) "licensed psychologist" is not included under subsection (a) (4)-(10).





Property interests "... are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law

...." Board of Regents v. Roth (1972)

408 U.S. 564, 577. Petitioner has failed to show any independent basis for this property interest. Therefore, the claim of a constitutionally protected property interest in those records must fail.

b. The district court properly found that Petitioner knowingly waived his right (to the records) by signing a release and waiver on January 21, 1986, which stated, in part, "I further understand that I waive any right or opportunity to read or review any background investigation report prepared by the Stockton Police Department." The court further found that Petitioner offered no evidence to show that this and other



waivers signed by him were the result of overreaching or bad faith by City.

4.

THE ALLEGEDLY CONFLICTING DECISIONS  
REGARDING "APPLICANT" CASES ARE  
DISTINGUISHABLE ON THEIR FACTS.

Petitioner's "applicant" cases can readily be distinguished from the facts in this situation. Ramirez v. San Mateo Dist. Atty's Office (9th Cir. 1981) 639 F.2d 509 involved a disputed jury instruction which has no application to a case in which proffered "evidence" failed to withstand a summary judgment motion. McFarlane v. Grasso (2d Cir. 1982) 696 F.2d 217 supports the Ninth Circuit's conclusion that the First Amendment claim should be rejected since the grievance and litigation initiated by Engel was not remotely connected to an issue of public concern. Harris v. Conradi (11th Cir. 1982) 675 F.2d 1212 involved political speech and dealt with the appointment of



election officials. The court in Gai v. U.S. Postal Service (3d Cir. 1986) 800 F.2d 64 upheld a summary judgment motion for defendant on the issue of whether the plaintiff had established a claim denying the right of free speech. The court held that the subject matter there, as in the instant case, did not rise to the level of a public concern and was therefore not a valid First Amendment claim. Finally, Childers v. Dallas Police Dept. (N.D. Texas 1981) 512 F.Supp. 134, affirmed without opinion (5th Cir. 1982) 669 F.2d 732, involved the refusal of the Dallas Police Department to hire an individual as a property clerk on the basis of the plaintiff's avowed homosexuality. None of the foregoing "applicant" cases provide authority to support the position that on the facts presented Petitioner has a valid First Amendment or liberty interest claim.



CONCLUSION

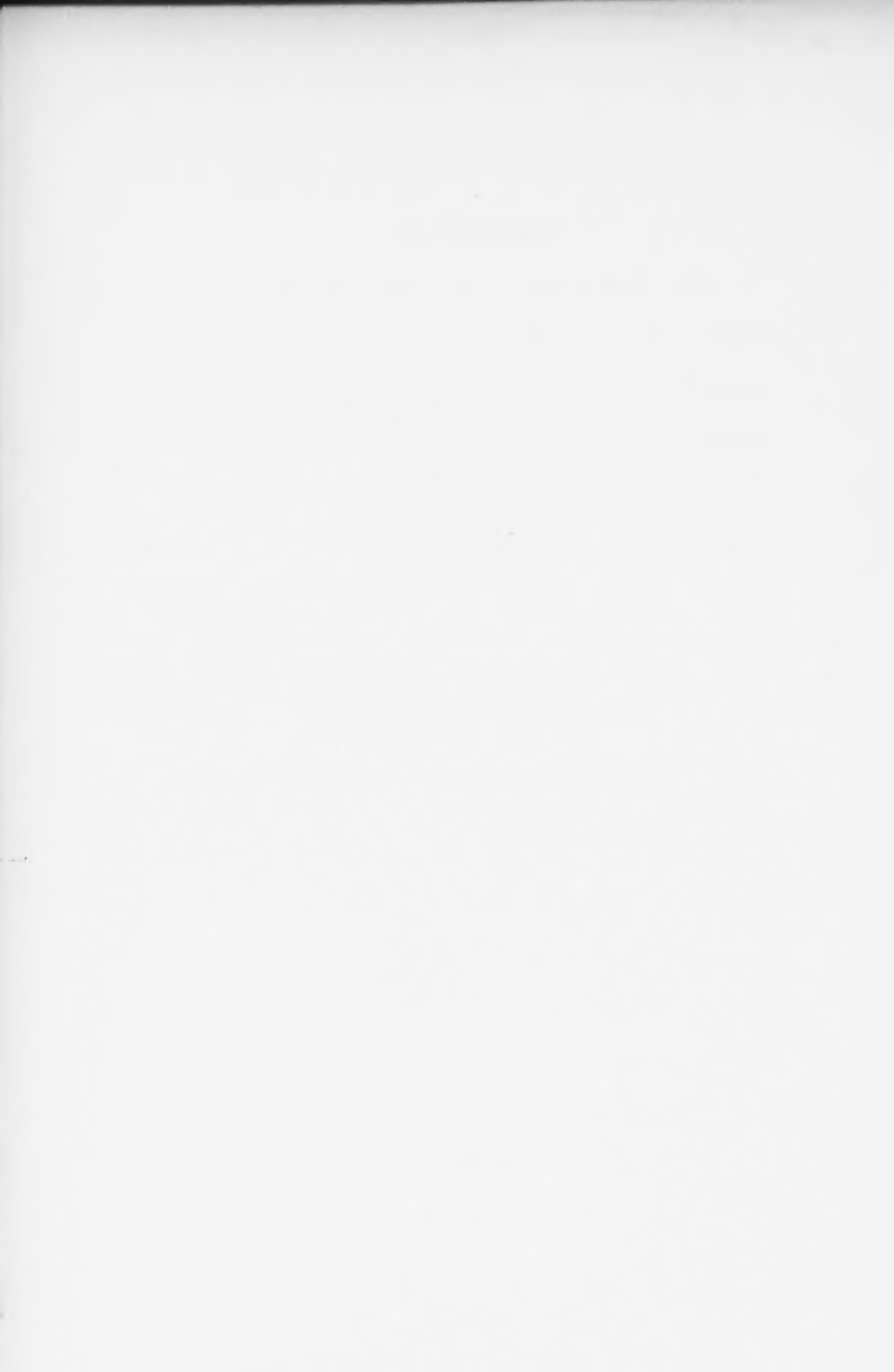
For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CYNTHIA L. HUMBERT  
Deputy City Attorney  
City of Stockton

Attorneys for Respondents





## APPENDIX



CALIFORNIA GOVERNMENT CODE

§ 1031

Each class of public officers or employees declared by law to be peace officers shall meet all of the following minimum standard: ....

(f) Be found to be free from any physical, emotional, or mental condition which might adversely affect the exercise of the powers of a peace officer. Physical condition shall be evaluated by a licensed physician and surgeon. Emotional and mental condition shall be evaluated by a licensed physician and surgeon or by a licensed psychologist who has a doctoral degree in psychology and at least five years of postgraduate experience in the diagnosis and treatment of emotional and mental disorders.

§ 12940(d)

.... Nothing in this subdivision shall prohibit any employer from making, in connection with prospective employment, an inquiry as to, or a request for information regarding, the physical fitness, medical condition, physical condition or medical history of applicants if that inquiry or request for information is directly related and pertinent to the position the applicant is applying for or directly related to a determination of whether the applicant would endanger his or her health or safety or the health or safety of others.



CALIFORNIA HEALTH AND SAFETY CODE

§ 1795.10  
(former § 25251)

As used in this chapter:

- (a) "Health care provider" means any of the following:
- (1) A health facility licensed pursuant to Chapter 2 (commencing with Section 1250) of Division 2.
  - (2) A clinic licensed pursuant to Chapter 1 (commencing with Section 1200) of Division 2.
  - (3) A home health agency licensed pursuant to Chapter 8 (commencing with Section 1725) of Division 2.
  - (4) A physician and surgeon licensed pursuant to Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code or pursuant to the Osteopathic Act.
  - (5) A podiatrist licensed pursuant to Article 22 (commencing with Section 1460) of Chapter 5 of Division 2 of the Business and Professions Code.
  - (6) A dentist pursuant to Chapter 4 (commencing with Section 1600) of Division 2 of the Business and Professions Code.
  - (7) An optometrist licensed pursuant to Chapter 7 (commencing with Section 3000) of Division 2 of the Business and Professions Code.



- (8) A chiropractor licensed pursuant to the Chiropractic Initiative Act.
- (9) A marriage, family and child counselor licensed pursuant to Chapter 13 (commencing with Section 4980) of Division 2 of the Business and Professions Code.
- (10) A clinical social worker licensed pursuant to Chapter 14 (commencing with Section 4990) of Division 2 of the Business and Professions Code.

....

§ 1795.12  
(former § 25252)

(a) Notwithstanding Section 5328 of the Welfare and Institutions Code, and except as provided in Sections 1795.14 and 1795.16, any adult patient of a health care provider, any minor patient authorized by law to consent to medical treatment, and any patient representative shall be entitled to inspect patient records upon presenting to the health care provider a written request for those records and upon payment of reasonable clerical costs incurred in locating and making the records available. However, a patient who is a minor shall be entitled to inspect patient records pertaining only to health care of a type for which the minor is lawfully authorized to consent. A health care provider shall permit this inspection during business hours within five working days after receipt of such a written request. The inspection shall be conducted by the





patient or patient's representative  
requesting the inspection, who may be  
accompanied by one other person of his or  
her choosing.

....